IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9465 OF 2004

Ashwinkumar Mahindra & Others. .. Petitioners
Vs.
Shambunath Sen. .. Respondent
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Shri A.K.Abhyankar with Ms Asha M.Bhambwani for the petitioners.

Shir Arjun Bobade i/by Shri Lalit V.Jain for the respondent.
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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 29th NOVEMBER, 2004.

P.C.

1. Heard the learned advocates for the parties. Perused the records.

2. The petitioners challenge the lower Appellate Court’s order allowing the appeal of the respondent and decreeing the suit against the petitioners on the ground of subletting as provided under Section 13(1)(e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter called as "the said Act".

3. Undisputedly, the suit for eviction was filed on various grounds including the grounds of subletting, acquisition of alternative accommodation, non-user of the premises, etc. and the trial Court had dismissed the suit in relation to all the said grounds. However, the lower appellate Court allowed the appeal in relation to the ground of subletting while recording specifically that the ground of non-user of the premises was given up. The learned advocate for the petitioners, while challenging the impugned order, submitted that the ingredients of the ground of subletting have not at all been established by the respondent by producing necessary evidence on record, and therefore, the lower appellate Court erred in interfering with the order of dismissal of the suit passed by the trial Court. He further submitted that the ground of non-user of the premises was specifically given up at the stage of the appeal, and considering the said fact along with the pleadings in the plaint and more particularly the paragraphs 5 and 6 thereof, it is apparent that the ground of subletting was on the basis that the defendant Nos.1 to 3 had left the suit premises and had shifted themselves to Delhi permanently on acquisition of the permanent accommodation, and therefore, they had let out the suit premises in favour of the petitioner No.3

i.e. the defendant No.4. Once the ground of non-user of the premises by the defendant Nos.1 to 3 was given up and the trial Court's finding about the failure on the part of the respondent to establish the case regarding the acquisition of alternative accommodation having not been interfered with at the appellate stage, the lower appellate Court's finding on account of failure on the part of the petitioners to establish the relationship with the defendant No.1 and holding that he is not a family member of the defendant Nos.1 to 3, that by itself cannot constitute a subletting in favour of the defendant No.4. It was submitted that it is well settled that mere presence of third person in the leased premises that by itself does not constitute a subletting.

4. Perusal of the records apparently discloses that in answer to the issue of subletting putforth by the respondent-landlord, it was specific case of the petitioners and all other defendants that since 1976 the defendant No.4 has been residing in the suit premises. Albeit, it was the contention of the petitioners and the other defendants that he has been residing in the suit premises as the family member of the defendant No.1. Whether the petitioner No.3 i.e. defendant No.4 is a family member of the defendant

No.1 or not, can be within the knowledge of the petitioner No.3 and the defendant No.1 and/or their family members. Apart from the fact that it was a specific defence of the petitioner No.3 and the other defendants that the petitioner No.3 is a family member of the defendant No.1's family, being the son of the sister of the original defendant No.1, it was necessary for the petitioner No.3 and the other defendants to establish the said fact by leading cogent evidence in that regard. When it is said to be the cogent evidence, it need not be a documentary evidence, and it can also be a oral evidence. However, in the case in hand, apart from their mere claim in that regard by the defendants themselves i.e. including the petitioner No.3, no evidence, documentary or oral, has been produced on record to establish that the defendant No.1 is in any manner related to the defendant No.4 i.e. the petitioner No.3 herein. Being so, there was absolutely no evidence in support of the claim of the petitioner No.3 that he is either relative of the defendant No.1 or her family member.

5. Undoubtedly, the defendants had produced the evidence in the form of electoral roll, ration card, telephone bills and the electricity bills, which

disclose the name of the defendant No.1 in relation to the electricity and telephone connection, electoral roll and ration card. However, it is to be noted that all these documents are prepared on the basis of the information submitted by the party itself. In that sense, they are documents disclosing unilateral declaration. Recording of the name in such documents is based on the information submitted by the party in whose favour such documents are to be found. There is no adjudication in that regard, as such. Being so, such documents, no doubt, can lead to a presumption in favour of the party relying upon such documents. However, this presumption stands rebutted by the admission by the petitioner No.3 himself that he has been in occupation of the suit premises since 1976. Undoubtedly, it was the case of the petitioner No.3 and the other defendants that the petitioner No.3 was occupying the suit premises as the family member of the original defendant No.1. As regards the claim about he being the family member and relative of the defendant No.1, it is to be noted that the said the fact was within the exclusive knowledge of the petitioner No.3 and the other defendants, and the documents produced being unilateral documents cannot be said to be sufficient to give presumptive value to such documents. Once it was a specific case regarding

the exclusive possession of the premises of the petitioner No.3, while admitting that the petitioner No.3 was in possession of the suit premises as family member of the defendant No.1, it was necessary for him and the other defendants to prove the said claim with cogent evidence on record, and not merely to rely upon the presumption arising from such documents. The presumption which arises from such documents stood rebutted, once the petitioner No.3 himself admitted that he was in possession of the suit premises since 1976, and that therefore it was necessary for the petitioner No.3 himself to produce further evidence to disclose that the possession of the suit premises was not the exclusive possession.

6. Above facts are to be noted along with the other evidence and the findings arrived at by the Courts below regarding residential premises available for the defendant No.3 at Delhi, the death of the defendant No.1 has occurred at Delhi, and no evidence being produced by the defendants about actual payment of the expenses in relation to the telephone and the electricity bills by the defendant No.4 himself. The findings arrived at by the Courts below about subletting of the premises along with the absence of materials regarding the relationship of the petitioner

No.3 and the defendant No.1 as well as in relation to the petitioner No.3 being the family member of the defendant No.1, cannot be found fault with.

7. It is well settled that as regards the consideration, it can be gathered by the circumstantial evidence and there may not be any direct evidence in that regard. Once it is clear that the defendant No.1 along with the petitioner No.3 i.e. the defendant No.4 is residing in the suit premises, they continued to reside in the suit premises right from the day on which the defendant No.1 was married, even his children were born in the suit premises, all these facts are sufficient to infer that such occupation is for consideration to the defendant No.1, more particularly in the absence of evidence regarding the relationship and being the family member of the defendant No.1.

8. The finding arrived at in relation to the ground of subletting therefore cannot be found fault with, and it cannot be said to be perverse and the same is not borne out from the records, and therefore, the same does not warrant interference in writ jurisdiction. The petition, therefore, is rejected.

9. On oral request by the learned advocate for the petitioners, the order of eviction shall not be executed till 28th February, 2005 subject to the petitioners and all the adult members of the petitioners and other defendants filing usual undertaking before the Registrar (J) within a period of three weeks from today that the petitioners and all the adult members of the petitioners and the other defendants shall deliver vacant and peaceful possession of the suit premises to the respondent-landlord on or before the 28th February, 2005 and meanwhile they shall not part with the possession nor shall create any third party interest nor shall induct any third party in the suit premises. In case, the petitioners and the other defendants fail to file aforesaid undertaking within three weeks, as stated above, the extension granted for delivering the possession of the suit premises by this Court shall automatically stand cancelled without being referred to the Court.

10. The petition is accordingly rejected in above terms with no order as to costs.